

PUBLIC UTILITIES COMMISSION

505 VAN NESS AVENUE

SAN FRANCISCO, CA 94102-3298



June 20, 2006

Agenda ID #5773
Quasi-Legislative

TO: PARTIES OF RECORD IN RULEMAKING 00-02-003

This is the draft decision of Commissioner Geoffrey Brown. It will not appear on the Commission's agenda for at least 30 days after the date it is mailed. The Commission may act then, or it may postpone action until later.

When the Commission acts on the draft decision, it may adopt all or part of it as written, amend or modify it, or set it aside and prepare its own decision. Only when the Commission acts does the decision become binding on the parties.

Parties to the proceeding may file comments on the draft decision as provided in Article 19 of the Commission's "Rules of Practice and Procedure," accessible on the Commission's website at <http://www.cpuc.ca.gov>. Pursuant to Rule 77.3 opening comments shall not exceed 15 pages.

Comments must be filed with the Commission's Docket Office. Comments should be served on parties to this proceeding in accordance with Rules 2.3 and 2.3.1. Electronic copies of comments should be sent to ALJ Allen at pva@cpuc.ca.gov. All parties must serve hard copies on the ALJ and the assigned Commissioner, and for that purpose I suggest hand delivery, overnight mail or other expeditious methods of service. The current service list for this proceeding is available on the Commission's web site, www.cpuc.ca.gov.

/s/ ANGELA K. MINKIN
Angela K. Minkin, Chief
Administrative Law Judge

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Attachment

Decision **DRAFT DECISION OF COMMISSIONER BROWN**
(Mailed 6/20/2006)

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Order Instituting Rulemaking on the Commission's own motion into the programs, practices and policies related to implementation of the California Environmental Quality Act as it applies to jurisdictional telecommunications utilities.

Rulemaking 00-02-003
(Filed February 3, 2000)

**OPINION MODIFYING THE COMMISSION'S APPLICATION
OF THE CALIFORNIA ENVIRONMENTAL QUALITY ACT
TO TELECOMMUNICATIONS UTILITIES**

Summary

This decision implements changes to the Commission's application of the California Environmental Quality Act (CEQA) to telecommunications utilities. The changes are designed to more closely align the Commission's practices with the current requirements and policies of CEQA, and to ensure that the application of CEQA in the area of telecommunications does not create competitive disparities.

An Assigned Commissioner's Ruling (ACR) issued on April 26, 2006 set forth a proposal for a streamlined environmental review process for all

telecommunications carriers, called the CEQA Expedited Treatment Process (ETP) for telecommunications.¹ We adopt that process with modifications.

Under the ETP, a carrier will submit a proposal to Commission staff for construction activities it believe is exempt from CEQA, and Commission staff will review that proposal on an expedited basis. Any carrier who wishes to perform construction activity that is not exempt from CEQA must seek a Permit to Construct, similar to the Permit to Construct required under General Order (GO) 131-D for construction of electric transmission facilities.

In this decision we clarify and modify the proposal set forth in the ACR. Specifically, we take the following steps:

- Clarify the relationship between CEQA review and competitive fairness;
- Modify the ETP to reduce the likelihood of “piecemealing” (the improper division of a large project into smaller pieces for purposes minimizing environmental review);
- Create a category of construction, repair, and maintenance activities that are exempt from the ETP because they have no significant environmental impact; and
- Establish a process for the development and issuance of a new General Order.

CEQA and Competition

This Rulemaking was initiated in part to respond to concerns about the wide variation in the level of environmental review required for different types of telecommunication providers. For most incumbent local exchange carriers,

¹ The ACR is attached as Appendix A to this decision.

such as AT&T (the former SBC) and Verizon, whose authority to operate and construct facilities predates the enactment of CEQA, the Commission performs no environmental review of any of their construction projects, no matter how large. For competitive local exchange carriers fortunate enough to apply for a CPCN from approximately 1995 through most of 1999, the Commission also performs no ongoing environmental review of construction projects within the limitations of those carriers' CPCNs,² again regardless of the scale or location of the construction. Non-dominant inter-exchange carriers, and competitive local exchange carriers certificated after 1999 generally received (and continue to receive) individualized project-specific environmental review under CEQA. In short, the Commission's past environmental review practice placed widely varying burdens on different telecommunications providers, and the disparities are also ongoing. (See, Comments of AboveNet Communications, pp. 2-3.)

In this decision we level the CEQA treatment for telecommunications providers regulated by the Commission. We do not want our CEQA compliance requirements to be so uneven that they create competitive disparities; at the same time, it is not appropriate to use CEQA as a tool to attempt to counterbalance other competitive advantages or disadvantages. Our purpose here is to make sure that our CEQA regime does not itself tilt the competitive playing field. To the extent that the playing field is tilted for reasons beyond CEQA, it is also beyond the scope of this proceeding.

² The primary limitation placed on these carriers, via a Mitigated Negative Declaration (MND) that accompanies the CPCN, is that their construction is limited to existing utility rights-of-way, and is subject to standardized mitigation measures required by the MND.

Parties should not look to this proceeding to remedy all possible competitive disparities. For example, a new market entrant who wishes to lay conduit will need to undergo a CEQA review in order to dig trenches, while an incumbent who already has fiber in the ground does not. The focus of CEQA and this proceeding are on environmental impacts, and all we can do is ensure fair treatment going forward. Neither CEQA nor this proceeding can remove those advantages held by incumbents, particularly if the incumbents need not cause as much disturbance to the physical environment as a new entrant.³

However, as ClearLinx points out, to the extent our new process replaces multiple local reviews with a uniform statewide review, it also helps to level the competitive playing field:

Localized CEQA review would also create an onerous and disproportionate burden on new market entrants and smaller carriers whose projects and operations are on a limited scale. These carriers do not have the government relations and regulatory compliance resources that are routinely deployed by dominant incumbent local exchange carriers (“ILECs”) that operate in, and have regular dealings with, virtually all municipalities in the state. Moreover, carriers such as ClearLinx that provide service using a distributed antenna system (“DAS”), typically have construction projects that are smaller in scale and have a lesser impact on any single municipality than the larger scale projects of the dominant carriers. Nevertheless, these projects frequently involve more than one municipality. Thus, having the ability to obtain centralized CEQA review from a state agency is critical to providing a level playing field for new market entrants such as DAS carriers. (Reply Comments of ClearLinx, p.2.)

³ A properly administered CEQA regime may in fact provide an advantage to an incumbent carrier that does not need to do as much construction as a new entrant.

This decision does not address issues relating to cell sites and mobile telephone switching offices, which are subject to our General Order 159-A. To the extent that a wireless telecommunications carrier regulated by this Commission constructs facilities other than cell sites or mobile telephone switching offices, this decision does apply, as such construction is beyond the scope of General Order 159-A. Finally, this decision does not apply to entities that are not subject to this Commission's jurisdiction, such as cable television providers not certificated by this Commission.

Consistency With CEQA

A number of comments received in response to the ACR addressed the consistency with CEQA of the proposal contained in the ACR. Some parties, primarily the incumbent local exchange carriers AT&T and Verizon, recommended that local governments, such as cities and counties, would be more appropriate lead agencies for CEQA than the state, on the grounds that telecommunications projects are generally local in nature.

The determination of the proper lead agency for a project under CEQA is to be made on a project-specific basis. (CEQA Guideline 15051.) While our proposal to implement a new discretionary approval may have the result that the Commission acts as lead agency for more projects, that is not a requirement of the proposal. Many telecommunications projects may in fact be statewide, or extend across multiple local jurisdictions, in which case state-level CEQA review

would be more appropriate than multiple, and potentially inconsistent, local CEQA processes.⁴ ClearLinx correctly observes that:

Shifting CEQA review to local jurisdictions will almost certainly lead to non-uniform results, as each local jurisdiction administers its own CEQA review process according to a different process, with different timelines, criteria and resources. Such multi-jurisdiction review would be especially problematic for projects that extend across jurisdictional boundaries, so that different portions of the same project would be subject to varying review. (Reply Comments of ClearLinx, pp. 1-2.)

For any particular project subject to the Commission's discretionary review, the Commission may be the lead agency or a responsible agency. (CEQA Guidelines 15050-15053.)⁵

The California Attorney General (AG) points out that the proposal contained in the ACR "could lead to piecemeal consideration of projects that should be reviewed together, as a whole." (Comments of the AG, p. 2.) This is a valid concern, and we modify our approach to require that a carrier identify in the ETP application reasonably foreseeable future phases, or other reasonably

⁴ In some cases the local government may be the lead agency. For example, if a city is performing an environmental review of a new development, it may be appropriate for that review to include construction of telecommunications facilities to serve that development. In such a case, the Commission would probably have the role of a responsible agency.

⁵ NextG Networks argues that telecommunications carriers have a legal right to install facilities in public rights-of-way, and that cities are barred from requiring discretionary permits for access to rights-of-way. (Comments of NextG, pp. 6-7, Reply Comments of NextG, p. 4.) If NextG is correct, then requiring local governments to act as lead agencies under CEQA, as proposed by AT&T and Verizon, would in fact result in no CEQA review.

foreseeable consequences, of its proposed construction.⁶ In addition, we will adopt part of the AG's recommended modification, requiring a carrier to also identify all expansions to its network undertaken in the same geographic region within the past two years, where geographic region is defined as the county in which the proposed construction will occur and any adjacent counties. (Id. p. 4.)

Some parties, including Level 3, argue that the ETP process is inconsistent with CEQA by essentially requiring an "environmental review" for projects that are exempt from CEQA. According to Level 3, carriers would be required to provide more information than is necessary for Commission staff to make a determination whether a project qualifies for an exemption.

The Commission does in fact need to have enough information not only to determine whether a project is subject to an exemption, but also whether an exception to an exemption applies. Public Resources Code section 21084 and CEQA Guideline 15300.2 identify situations in which categorical exemptions may not be used, including particularly sensitive environments, significant cumulative impacts, significant environmental effects due to unusual circumstances, possible damage to scenic resources within state scenic highways, hazardous waste sites, and possible adverse changes in the significance of a historical resource. Merely finding that an exemption appears to be applicable is not enough; the Commission staff needs enough information to determine

⁶ We believe this approach more realistically reflects the nature of the telecommunications industry, as compared to the forward-looking part of the AG's recommended modification, which would require a carrier to identify in the ETP application "all expansions to its network undertaken in the same geographic region...anticipated to occur within the next two years." (Id., p. 4.)

whether an exemption is appropriate for the specific project, and the ETP is designed to provide that information.

The ETP ensures that use of an exemption is appropriate, and that the applicability of an exemption is based upon adequate analysis. Given the intense competitive pressures that can be present in the telecommunications market, telecommunications providers may have an incentive to underestimate the environmental impacts (and the corresponding environmental review process) of their projects. Ultimately, the responsibility for compliance with CEQA rests with the Commission, not the applicant, and we take this responsibility seriously.⁷

The ETP functions by requiring some upfront analysis by applicants, allowing for a faster turnaround by staff. If applicants provided less information and analysis, then Commission staff would need to perform the analysis, slowing the approval process.

Several parties note that CEQA review is triggered by a discretionary decision by a public agency, and argue that the ETP creates a stand-alone environmental review that is inconsistent with CEQA. (See, e.g. Comments of SureWest Telephone, pp. 1-2.) This decision does not create a stand-alone environmental review. Instead, it creates a new discretionary decision in a limited set of circumstances, consisting of the determination whether to issue a

⁷ In addition, we do not want any carrier to gain an unfair competitive advantage by falsely claiming to be exempt from CEQA.

permit to construct, analogous to our existing permit to construct for electric projects under General Order 131-D.⁸

Any and all construction activity in the area of telecommunications is now subject to the requirement for a permit to construct, but we have also crafted exceptions to this requirement (discussed in more detail below) that should encompass the vast majority of all construction activity. In short, most construction activity will not require a permit to construct.

A number of carriers make varying arguments based upon the assumption that the new process will slow the deployment of telecommunications infrastructure. (See, e.g. Comments of SureWest, pp. 3-4.) For those carriers who currently perform no environmental review prior to construction, the ETP may result in a slight delay during which they would consider the environmental consequences of their actions in a manner consistent with California law. Other carriers, however, note that the current system imposes significant delays in construction for some carriers (particularly new entrants) based on the happenstance of the date or category of their CPCN. (Comments of AboveNet, pp. 1-2; Comments of ClearLinx, pp. 1-2.)

The proper approach is to look at telecommunications infrastructure as a whole, rather than by which individual carriers gain or lose in relation to the status quo, as any change will result in “winners” and “losers.” For all carriers, our new approach will provide clarity, regulatory certainty, and fairness, and

⁸ The ACR requested party comments addressing the process for obtaining a permit to construct (p. 6), but few were received.

will reduce the risk of delay due to litigation.⁹ Finally, our modification of the ETP to provide for an “out” for certain construction, repair and maintenance activities (discussed below) addresses the main cause of potential delay, which was the over-inclusive nature of the ETP as proposed in the ACR. As modified, the ETP ensures that California’s telecommunications infrastructure is built not only in a timely manner, but consistent with the law and without degradation of California’s environment.

Some carriers advocate for continued or expanded use of the pre-1999 batch mitigated negative declaration process. (See, e.g., Comments of Time Warner Telecom.) That process was made unavailable to new entrants for the simple reason that it did not comply with CEQA. (See, D.99-12-050 and D.99-10-025.) Accordingly, it would be contrary to statute (and counterproductive) to attempt to reintroduce it now. Similarly, allowing companies holding CPCNs with batch MNDs to continue to build under those MNDs, while not allowing new entrants similar treatment, fails to address the competitive disparities this Rulemaking was intended to remedy.

Process

The ACR stated that: “Carriers should submit a proposal to Commission staff under the ETP for all construction activities they believe are exempt from CEQA.” A number of parties pointed out that “all construction activities” encompasses a potentially vast number of activities, including those that unquestionably have no environmental impact. This observation is correct. The

⁹ Particularly litigation alleging that the Commission’s processes are inconsistent with CEQA.

scope of the ETP needs to be narrowed. Accordingly, we will exempt certain activities from the ETP.

An approach we have used since 1999, sometimes referred to as “limited facilities-based” authority, exempts specific construction activities from environmental review by the Commission. Under the limited facilities-based approach, installation of equipment in existing buildings or structures, such as placing a switch in an existing building, or pulling fiber through existing conduit, does not require an environmental review. (See, Comments of NextG Networks, pp. 2-3, citing D.03-01-061 and D.06-01-006.) For example, a carrier was granted limited facilities-based local exchange authority, “restricted to the use of unbundled network elements (UNEs) and the placement of equipment within or on previously existing buildings and structures,” but was “prohibited from engaging in any construction of buildings, towers, conduits, poles, or trenches.” (See, D.01-08-013, citing D.99-10-025.)

There is one ambiguity in this approach, however. The Commission has found that it can be seen with certainty that there is no possibility of adverse environmental impact if construction activity is “limited to installing equipment in existing buildings and structures.” (Id., emphasis added.) However, in another part of the same decision¹⁰, the Commission states that it is allowing “the placement of equipment within or on previously existing buildings and structures.” (Id., emphasis added.)

¹⁰ This particular decision is merely an exemplar – the same language appears in multiple Commission decisions.

For purposes of this proceeding, we find that placement of equipment in existing buildings and structures does not require use of the ETP process. The question of whether to also allow placement of equipment on existing buildings and structures outside of the ETP is more difficult, as the answer tends to be more fact-dependent. For example, placement of an 18-inch antenna dish on the side of an existing building would not have the same visual impact as placement of an 18-foot antenna dish on that building. Similarly, stringing new aerial conduit on existing poles through an industrial area is not the same as stringing new aerial conduit on existing poles along coastal stretches of Highway 1 or across sensitive wetlands.

While we do not wish to create a loophole in our CEQA review process that could result in no review of projects that could cause significant environmental impacts, requiring the ETP process for all activities involving placement of equipment on existing buildings and structures would not be appropriate, as it would encompass a massive number of activities that have no significant environmental impact. (See, Comments of AT&T, *supra*.) It is, however, possible to chart a course between these two obstacles. We will not require use of the ETP for construction activities consisting of the placement of equipment on existing buildings and structures, but only if: 1) that activity results in no significant visual impact, and 2) that activity does not take place on or adjacent to a particularly sensitive environment.¹¹ In addition, construction

¹¹ Examples of particularly sensitive environments include, but are not limited to, endangered species habitat, wetlands, and known cultural heritage sites.

activity without an environmental review is not allowed when any of the conditions identified in CEQA Guideline 15300.2 are present.¹²

We agree that requiring the use of the ETP process for all construction activities would put a large and unnecessary burden on both telecommunications providers and Commission staff, as many construction activities do not require environmental review under CEQA. We will use the above criteria to create an exception to the use of the ETP process. Accordingly, if a carrier wishes to place equipment in an existing building or structure, it need not seek Commission approval through the ETP process to do so, and if it wishes to place equipment on an existing building or structure, and meets the more detailed requirements set forth above, it need not seek Commission approval through the ETP process to do so.¹³

This change makes the construction approval process for telecommunications projects very similar to the process we use for electric projects under General Order 131-D. Under GO 131-D, distribution-level projects generally need no Commission review, smaller transmission-level projects require a Permit to Construct (consisting primarily of a CEQA review), and larger transmission-level projects require a CPCN and accompanying CEQA

¹² Those conditions are: particularly sensitive environments, significant cumulative impacts, significant environmental effects due to unusual circumstances, possible damage to scenic resources within state scenic highways, hazardous waste sites, and possible adverse changes in the significance of a historical resource.

¹³ This approach relies upon the good faith of carriers to comply with the requirements of the new process. We do, however, anticipate incorporating compliance and enforcement mechanisms in an applicable General Order.

review. While the dividing lines between categories are necessarily different for telecommunications projects, the general approach is analogous.

AT&T points out that the ACR does not distinguish new construction from routine repair and maintenance in public rights-of-way, such as replacing poles. (Comments of AT&T, p. 13.) The repair and maintenance of existing facilities in general should have less of an environmental impact than the construction of new facilities, but we cannot assume that this is always the case.¹⁴ We will apply essentially the same criteria to repair and maintenance activities as we do for new construction; however, we anticipate that more repair and maintenance activities will fall within that criteria than will new construction activities.

To clarify how this will work, carriers need not use the ETP for performing routine repair and maintenance work on existing facilities, including replacement of equipment within existing structures, replacement of above-ground structures with structures the same dimensions or smaller, and replacement of poles with new poles of similar size and capacity. Again, this exception to the ETP is only available if the activity results in no significant visual impact, and 2) that activity does not take place on or adjacent to a particularly sensitive environment.¹⁵ Unless there are existing mitigation measures covering repair and maintenance imposed by an earlier CEQA review, repair and maintenance without an environmental review is not allowed when any of the conditions identified in CEQA Guideline 15300.2 are present.

¹⁴ For example, replacement of existing poles in a sensitive wetland may have a greater environmental impact than new trenching in a less sensitive area.

¹⁵ Examples of particularly sensitive environments include, but are not limited to, endangered species habitat, wetlands, and known cultural heritage sites.

Some parties appear concerned that incumbent carriers could gain a competitive advantage by upgrading their existing system and offering additional services under the guise of repair, maintenance, and equipment replacement. (See, Comments of Level 3.) According to this argument, the incumbents could essentially get a new system while undergoing less CEQA review than a new entrant. This may, in fact, be true, but our focus here is on equitable application of CEQA. If the construction activities of the incumbents cause no significant environmental harm, while the construction activities of new entrants do cause significant environmental harm, the Commission's CEQA review should reflect those realities. This proceeding is about CEQA, and is not an appropriate forum to redress any and all perceived competitive imbalances.

SCE recommends that instead of requiring the signature of a corporate officer, the ETP proposal should be certified under penalty of perjury by an individual who has first-hand knowledge of the project and who has specific delegated authority to represent the carrier. Under SCE's proposal, that individual may be an officer or another management-level employee. (Comments of SCE, pp. 8-9.) We adopt SCE's recommended change.

Confidentiality

A number of parties raise concerns about the level of information disclosure required by the ACR's proposal. Specifically, carriers are concerned that competitors, including competitors not subject to Commission regulation, could gain competitively sensitive and valuable information as a consequence of the public disclosure of construction plans. This is a valid concern, as some of the information at issue could indeed constitute trade secrets. At the same time, the policy of the Commission and of CEQA is to favor public disclosure and open decision-making.

The most precise way to balance these two concerns is through an individualized, case-specific review, in which a carrier could request that specific information be kept confidential. That request would then be considered under the Commission's policies and practices for handling confidential information. (See, Public Utilities Code section 583 and General Order 66-C.) While such an approach would assure a proper balancing of the competing needs for confidentiality and public disclosure, it is cumbersome, and inconsistent with the idea of an expedited review process.

While the record does contain some recommendations for how to address this issue (see, Comments of Southern California Edison Company, pp. 5-6), it is presently inadequate for us to develop an approach that does a good job of balancing the needs for disclosure and confidentiality in the context of an expedited process. Accordingly, we direct the assigned Commissioner and ALJ to hold workshops on this issue to develop an appropriate process for treatment of confidential information under the ETP.

General Order

The ACR indicated an intent to present a new General Order to the Commission with this decision, but given the complexity and importance of the General Order, it appears more advisable to develop it more carefully, with the benefit of additional party input.

Accordingly, we direct the Assigned Commissioner and ALJ, in coordination with Energy Division and Legal Division, to draft a General Order for distribution to the parties for comment within 30 days of the date of this decision. If it appears that workshops to refine language in the General Order would be helpful, the Assigned Commissioner and ALJ may hold workshops.

Comments on Draft Decision

The draft decision of the Assigned Commissioner was mailed to the parties in accordance with Pub. Util. Code § 311(g)(1) and Rule 77.7. Comments were received from_____.

Assignment of Proceeding

Geoffrey F. Brown is the Assigned Commissioner and Peter V. Allen is the assigned Administrative Law Judge for this proceeding.

Findings of Fact

1. Different telecommunications carriers are subject to widely varying certification and associated environmental review requirements by the Commission.
2. The Commission's variable application of the environmental review requirements under CEQA in the area of telecommunications has contributed to competitive disparities.
3. Consistent application of the environmental review requirements under CEQA in the area of telecommunications will reduce competitive disparities.
4. The Commission uses a Permit to Construct process for review of electric transmission projects under General Order 131-D.
5. The Commission is responsible for compliance with the environmental review requirements under CEQA.
6. Some construction projects in the area of telecommunications may be exempt from CEQA.
7. Many construction, repair, and maintenance activities in the area of telecommunications unquestionably have no significant environmental impact.

Conclusions of Law

1. The Commission's application of CEQA in the area of telecommunications should be modified to be more consistent, so as not to contribute to competitive disparities.
2. Consistent application of CEQA in the area of telecommunications requires the establishment of a new process for Commission review and approval of construction, repair, and maintenance activities.
3. A Permit to Construct process, similar to that used for electric transmission projects under General Order 131-D, can be used for review of telecommunications projects.
4. Any modifications to the Commission's application of CEQA must be consistent with law.
5. The Commission should establish a process to determine whether specific construction projects in the area of telecommunications are exempt from CEQA.
6. Construction, repair, and maintenance activities in the area of telecommunications that unquestionably have no significant environmental impact should not be subject to environmental review under CEQA.

O R D E R

IT IS ORDERED that:

1. The Commission establishes the CEQA Expedited Treatment Process (ETP) for telecommunications, as described above.
2. The Commission establishes the Permit to Construct (PTC) process for review and approval of telecommunications construction activities not eligible for the ETP.

3. Construction, repair, and maintenance activities in the area of telecommunications that unquestionably have no significant environmental impact do not require review under either the ETP or PTC process.

4. We direct the assigned Commissioner and Administrative Law Judge to develop an appropriate process for treatment of confidential information under the ETP.

5. We direct the assigned Commissioner and Administrative Law Judge to draft a new General Order to implement this decision.

This order is effective today.

Dated _____, at San Francisco, California.

APPENDIX A**BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA**

Order Instituting Rulemaking on the Commission's own motion into the programs, practices and policies related to implementation of the California Environmental Quality Act as it applies to jurisdictional telecommunications utilities.

Rulemaking 00-02-003
(Filed February 3, 2000)

ASSIGNED COMMISSIONER'S RULING REQUESTING COMMENTS**Summary**

This ruling sets forth a proposal for an improved application of the California Environmental Quality Act (CEQA) to Commission proceedings relating to telecommunications. Specific and detailed comments are requested to allow us to refine this proposal.

The process described in this ruling has two fundamental goals. The first is to further improve the Commission's compliance with CEQA in the area of telecommunications. The second is to eliminate the unfair disparities among telecommunications providers created by the Commission's present CEQA processes. The process set forth below meets both of these goals. It does so by basing the environmental review for a project on the specific construction that is

proposed, subsequent to issuance of a Certificate of Public Convenience and Necessity (CPCN)¹⁶.

Background

In California there is presently a significant disparity in the quality and quantity of the environmental review performed on telecommunications infrastructure construction. Some telecommunications providers have been authorized to build essentially anything, anywhere, without a discretionary decision from this Commission that would trigger a CEQA review.

Others, who received what was known as the “batch mitigated negative declaration,” have been authorized to build statewide, within existing utility rights-of-way, although there is some variation in the requirements imposed by the various batch negative declarations.¹⁷ While the Commission stopped issuing batch negative declarations in late 1999 (see D.99-12-050), carriers holding them are still building facilities under their requirements. Other carriers, including many that obtained their CPCNs after late 1999, received individual and project-specific CEQA review.

This multiplicity of environmental standards is problematic both from a CEQA standpoint and from a competitive fairness standpoint. The CEQA review provided does not match the construction that is going on. A company building almost nothing may have received greater environmental review than a

¹⁶ The proposed process would not alter the process for obtaining a CPCN, including any environmental review necessary for obtaining a CPCN. The process proposed here would apply to all construction activity that occurs after the issuance of a CPCN, and that did not receive CEQA review in the CPCN application process.

¹⁷ There is also some uncertainty as to the precise meaning of the term “right-of-way.”

company laying fiber statewide. Or two companies engaged in almost identical physical construction may be subject to very different environmental compliance regimes. This is neither a sound practice for protecting the environment nor for competitive fairness.

For example, under past Commission practice, all facilities-based CLECs received essentially the same level of environmental review (via the batch negative declaration), regardless of what they were planning to build. Such undifferentiated environmental review is not a good fit with CEQA, as some companies may receive less environmental review than warranted by their actual construction projects, while others may be burdened with more environmental scrutiny than needed.

The Solution

Regardless of the approach we ultimately adopt in this proceeding, it must be applicable across the board, to all telecommunication providers. If our new approach applies only to CPCNs issued after a decision in this proceeding, we will only extend the regulatory hodge-podge, carrying forward all of the existing flaws and inequities, and adding yet another new layer to the regulatory sediment.

The solution is to tie our CEQA review to Commission approval of the actual construction (and accompanying environmental effects) that a particular telecommunications provider is planning to undertake, subsequent to their obtaining a CPCN. Accordingly, I intend to present the following proposal to the full Commission. This proposal would apply to all telecommunications

providers regulated by the Commission, regardless of the nature of their CPCN or its date of issuance.¹⁸

This approach provides a level playing field among all telecommunications carriers, and ensures that our CEQA review matches the actual construction that is proposed.

Other Approaches

I have considered other approaches than the one proposed here. For example, one possibility would be to do a tiered system, roughly analogous to the approach taken for electric projects under our General Order (GO) 131-D. Under GO 131-D, electric transmission projects above 200 kV require the utility to obtain a CPCN from the Commission, projects between 50 kV and 200 kV require a simpler Permit to Construct, while projects under 50kV do not require Commission approval.

While I have borrowed aspects of GO 131-D for this proposal (such as its use of public notice and the permit-to-construct concept), its basic structure is less suitable for telecommunications than for electric transmission and distribution, as the physical size (and corresponding environmental impact) of telecommunications infrastructure does not vary the same way that electric infrastructure does.

Proxies for environmental impact, such as length of fiber laid, or other linear measurements, are not a good measure of environmental impact, as they ignore the nature of the environment through which the fiber passes. Similarly, categorizations based on the general nature of the environment have proved

¹⁸ This proposal would be embodied in a new General Order.

problematic as well, with registered cultural heritage sites being found in existing utility rights of way and urban roadways. Considering both aspects at an appropriate level of detail would require analysis not too different from a CEQA document, such as an Environmental Impact Report (EIR) or Mitigated Negative Declaration (MND).

Some parties may argue that for the Commission to develop a tiered approach applicable to telecommunications projects (e.g. some activities are exempt, some get standardized mitigations, some require specific environmental review), the Commission would need to prepare a program-level EIR.¹⁹ A program-level review could have several benefits. It would provide a more complete review of potential effects (including cumulative impacts) and alternatives than an individual review of each carrier's construction activities, and could avoid some duplication of efforts that would occur under individual review of each carrier.

While this approach may have some merit, it does not appear to be appropriate for the current environment of rapidly changing technologies and markets. A program EIR would be quite complex, and would require a significant amount of time and effort to prepare; given the shifting context and complexity of the process, the end product may or may not ultimately prove to be useful. Such a lengthy approach of such uncertain value simply does not provide a prompt answer to the pressing problems facing both this Commission

¹⁹ According to the CEQA Guidelines, "A program EIR is an EIR which may be prepared on a series of actions that can be characterized as one large project...." (14 CCR 15168(a)) Generally, these actions are related either geographically or as logical parts of a chain, but they could also be related "in connection with the issuance of rules or regulations governing the conduct of a continuing program,..." (14 CCR 15168(a)(3))

and the participants in California's rapidly changing telecommunications market. If there is strong and broad-based support expressed for a program EIR, the Commission may consider preparing one in the future, but it does not appear to be a feasible alternative at this time.

Another possible approach would be to essentially eliminate all discretionary review by the Commission of telecommunications infrastructure construction. This approach would level the playing field by equalizing environmental review at the lowest possible level, which is currently available only to the incumbent local exchange carriers. This approach would result in a radical decrease in our level of environmental review of telecommunications projects in California. Such an evisceration of environmental review is inconsistent with our obligations under CEQA.

The Process

I propose that the Commission adopt a streamlined environmental review process for all telecommunications carriers. This process will be called the CEQA Expedited Treatment Process (ETP) for telecommunications. This process is designed to accommodate only construction projects that are exempt from CEQA review. Carriers should submit a proposal to Commission staff under the ETP for all construction activities they believe are exempt from CEQA. Any carrier who wishes to perform construction activity that is not exempt from CEQA must seek a permit to construct.²⁰

²⁰ Similar to GO 131-D for electric projects, the permit to construct process would consist primarily of the necessary review under CEQA. The Commission does not need to reexamine the financial or technical qualifications of the carrier, nor make a finding of need for the proposed project. Parties should comment on how they envision the process of obtaining a permit to construct.

Carriers can determine the scope of what they wish to include in their proposals under the ETP; one proposal may include more than one project, or a project that extends over a period of time.²¹

Before submitting a proposal to the Commission staff under the ETP, all carriers should perform a rigorous self-assessment to ensure that the process is appropriate for their proposed construction activity. The first step in that process is for carriers to consider whether any of the following conditions are present:

- a. there is reasonable possibility that the activity may impact on an environmental resource of hazardous or critical concern where designated, precisely mapped and officially adopted pursuant to law by federal, state, or local agencies; or
- b. the cumulative impact of successive projects of the same type in the same place, over time, is significant; or
- c. there is a reasonable possibility that the activity will have a significant effect on the environment due to unusual circumstances. (CEQA Guideline 15300.2)

If any of these conditions are present, the ETP process is not appropriate, and a proposal for a permit to construct should be filed instead. If a proposal is submitted to staff under the ETP, and it is found that these conditions are present, the proposal will be rejected.

After that initial self-assessment, carriers shall submit an ETP proposal to the Commission's Energy Division²². Carriers are urged to prepare a thorough,

²¹ Carriers should not seek overly long-term approvals, as environmental conditions may change over time, rendering use of an exemption no longer appropriate. Similarly, proposals including too many different projects increase the risk of having the proposal rejected.

clear, complete, and accurate proposal. Given the short review time for the proposals, a high-quality proposal is more likely to be approved than one that is sloppy or incomplete.

A complete copy of the ETP proposal must be posted to the carrier's web site, in an easily findable location, no later than the day that the carrier submits its ETP proposal to the Energy Division.

The proposal shall contain the following:

- A detailed description of the proposed project, including:
 - The precise location of the proposed construction project
 - Regional and local site maps
 - Physical location of the customer(s) to be served, including street addresses.
- A description of the environmental setting, to include at a minimum:
 - General terrain and significant features
 - Cultural, historical, and paleontologic resources
 - Biological resources
 - Current land use and zoning
- A construction workplan, to include:
 - Pre-Construction Survey Checklist²³ – Archaeological Resources
 - Pre-Construction Survey Checklist – Biological Resources
 - A detailed schedule of construction activities, including site restoration activities
 - A description of construction/installation techniques, including equipment to be used

²² The Commission's CEQA review functions have been consolidated in Energy Division for all industries regulated by the Commission.

²³ Both Archeological and Biological Resource Checklists are attached as Appendix A.

- A list of other agencies contacted with respect to siting, land use planning, and environmental resource issues, including contact information
 - A list of permits required for the proposed project
 - A statement of the CEQA exemption(s) applicable to the proposed project, including citations to the CEQA Guidelines
 - Documentation and factual evidence sufficient to support a finding that the claimed exemption(s) is (are) applicable
 - Descriptions of all environmental research performed, and who that research was performed by, including contact information
 - Contact information for the carrier
 - A working link to the location on the carrier's web site of the complete copy of the proposal.
 - Proof of service of the following notices: service by e-mail (w/delivery receipt) or direct mail to the planning agency of the city and county where each activity is located; service by e-mail (w/delivery receipt) or direct mail to the land owner, if other than the carrier, on whose land the activity will occur; and publication in a newspaper of general circulation in the county where the activity will be located, no later than the date the proposal is tendered to the Energy Division. All such notices shall provide a clear description of the project, and shall include contact information for the carrier and for the Energy Division, and shall state the deadline for protesting the proposal.
 - Signature, under penalty of perjury, of an officer of the carrier
- Energy Division will review the proposal for the proposed project(s) to confirm that the claimed exemption(s) from CEQA are applicable, and will arrange for the link to the proposal to be posted to the Commission's web site
 - Within 7 days of receipt of an ETP proposal, Energy Division will provide "early bad news" if, upon initial review of proposal, there are obvious reasons why the proposal is not appropriate for the ETP process. Within 21 days from the date of Carrier's submittal Energy Division will issue either:

- A Notice to Proceed, and file a Notice of Exemption with the State Clearinghouse, Office of Planning and Research; or
 - A Letter of Denial stating the specific reasons why the project cannot be approved under the ETP, including an explanation of why any claimed CEQA exemption(s) are not applicable
 - Carrier shall not engage in any construction activity prior to receiving a Notice to Proceed.
- Protests must be submitted to Energy Division within 10 days of the date the link to the proposal appears on the Commission's web site. If a protest is submitted, at the end of the 21-day review period the Energy Division may approve the proposal, deny the proposal, or request one or more parties to provide additional information. If additional information is requested, Energy Division has 21 days from the date Energy Division receives all requested information to approve or deny the proposal.
- The carrier may remove the proposal from its web site, and the Commission may remove the link to the proposal from its web site, no sooner than 30 days after a Notice to Proceed and Notice of Exemption is issued by Energy Division, and no sooner than 10 days after a Notice of Denial is issued by Energy Division.

As described above, I intend to place a draft decision and General Order before my colleagues that incorporate this type of streamlined environmental review process for all telecommunications carriers. Detailed comments will be helpful in assessing both the policy approach and the implementation details.

IT IS RULED that:

1. Respondents shall file and serve comments on the proposal described in this ruling no later than May 12, 2006.
2. Interested parties may file and serve comments on the proposal described in this ruling no later than May 12, 2006.
3. Respondents and interested parties may file and serve replies to the comments on the proposal described in this ruling no later than May 19, 2006.

4. Anyone not currently on the service list for this proceeding who wishes to be added to the service list shall send a request via e-mail, no later than May 8, 2006, to the Commission's Process Office (ALJ Process@cpuc.ca.gov) and the assigned ALJ (pva@cpuc.ca.gov).

5. All parties should follow the electronic service protocols set forth in Rule 2.3.1.

Dated April 26, 2006, at San Francisco, California.

/s/ GEOFFREY F. BROWN

Geoffrey F. Brown
Assigned Commissioner

APPENDIX A

California Public Utilities Commission

Preconstruction Survey Checklist – Archaeological Resources

Date: _____

Name of Applicant: _____

Utility ID: _____

Location (Address, Provide Map): _____

Route Description: _____

Area Description:

- ☐ Urban
☐ Suburban
☐ Rural

Photo Documentation: ☐ Yes ☐ No

Substrate:

- ☐ Asphalt/Concrete
☐ Soil
☐ Other: _____

Archaeological Resources:

- ☐ Yes ☐ No CHRIS Records Search
☐ Yes ☐ No Request NAHC contact list and query Sacred Lands File
☐ Yes ☐ No Contact Parties on the NAHC list by letter and phone (identify concerns and sites)
☐ Yes ☐ No Site visit/survey (identify architectural, historic, and prehistoric resources)

Notes and Recommendations: _____

California Public Utilities Commission

Preconstruction Survey Checklist – Biological Resources

Date: _____

Name of Applicant: _____

Utility ID: _____

Location (Address, Provide Map): _____

Route Description: _____

Area Description:

- ☐ Urban
- ☐ Suburban
- ☐ Rural

Photo Documentation: ☐ Yes ☐ No

Substrate:

- ☐ Asphalt/Concrete
- ☐ Soil
- ☐ Other: _____

Biological Resources:

CNDDDB Search	<input type="checkbox"/> Yes	<input type="checkbox"/> No	Raptors Present	<input type="checkbox"/> Yes	<input type="checkbox"/> No
T&E Species Present	<input type="checkbox"/> Yes	<input type="checkbox"/> No	Burrows	<input type="checkbox"/> Yes	<input type="checkbox"/> No
Riparian Vegetation (List Spp)	<input type="checkbox"/> Yes	<input type="checkbox"/> No			
Tree Removal Needed?	<input type="checkbox"/> Yes	<input type="checkbox"/> No			
Nests Present (birds present? Spp)	<input type="checkbox"/> Yes	<input type="checkbox"/> No			

Notes: _____

Consultation Required? ☐ Yes ☐ No (If yes why?) _____

Water Resources and Wetlands:

Drainages Present	<input type="checkbox"/> Yes	<input type="checkbox"/> No	Wetlands Present	<input type="checkbox"/> Yes	<input type="checkbox"/> No
Lake or Pond	<input type="checkbox"/> Yes	<input type="checkbox"/> No	Delineation Required	<input type="checkbox"/> Yes	<input type="checkbox"/> No

Notes: _____

Permits Required:

USACE	<input type="checkbox"/> Yes	<input type="checkbox"/> No	NMFS	<input type="checkbox"/> Yes	<input type="checkbox"/> No
RWQCB	<input type="checkbox"/> Yes	<input type="checkbox"/> No	USFWS	<input type="checkbox"/> Yes	<input type="checkbox"/> No
CDFG	<input type="checkbox"/> Yes	<input type="checkbox"/> No	Regional Air Quality	<input type="checkbox"/> Yes	<input type="checkbox"/> No
State Lands Commission	<input type="checkbox"/> Yes	<input type="checkbox"/> No	Local Counties and Cities	<input type="checkbox"/> Yes	<input type="checkbox"/> No

CERTIFICATE OF SERVICE

I certify that I have by mail this day served a true copy of the original attached Assigned Commissioner's Ruling Requesting Comments on all parties of record in this proceeding or their attorneys of record.

Dated April 26, 2006, at San Francisco, California.

/s/ ERLINDA PULMANO

Erlinda Pulmano

N O T I C E

Parties should notify the Process Office, Public Utilities Commission, 505 Van Ness Avenue, Room 2000, San Francisco, CA 94102, of any change of address to insure that they continue to receive documents. You must indicate the proceeding number on the service list on which your name appears.

The Commission's policy is to schedule hearings (meetings, workshops, etc.) in locations that are accessible to people with disabilities. To verify that a particular location is accessible, call: Calendar Clerk (415) 703-1203.

If specialized accommodations for the disabled are needed, e.g., sign language interpreters, those making the arrangements must call the Public Advisor at (415) 703-2074, TTY 1-866-836-7825 or (415) 703-5282 at least three working days in advance of the event.

INFORMATION REGARDING SERVICE

I have provided notification of filing to the electronic mail addresses on the attached service list.

Upon confirmation of this document's acceptance for filing, I will cause a copy of the Notice of Availability to be served upon the service list to this proceeding by U.S. mail. The service list I will use to serve the copy of the Notice of Availability is current as of today's date.

Dated June 20, 2006, San Francisco, California.

/s/ ERLINDA PULMANO

Erlinda Pulmano

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